

Matter of Gabay
Del. Supr. No. 409, 2002 (8/27/02)
Board Case No. 26, 2001

Disciplinary Rules Involved: DLRPC 1.15(b), 1.15(d), 8.4(d)

Sanctions Imposed: Two-Year Probation; Public Reprimand

By order dated August 27, 2002, the Delaware Supreme Court ordered that Joseph A. Gabay, Esquire (“Respondent”) be publicly reprimanded, subject to a two-year probationary period. The Court approved a report that was submitted by a panel of the Board on Professional Responsibility (“Board”). The Board’s report concluded, in accordance with the stipulation and joint recommendation of sanction entered into by the Office of Disciplinary Counsel (“ODC”) and the Respondent, that he had violated the Delaware Lawyers’ Rules of Professional Conduct (“Rules”), and that he should be publicly reprimanded and placed on public probation for a period of two years.

The disciplinary violations arose out of the Respondent’s handling of a real estate settlement for buyers Jon and Tara Thies, in which funds were held in escrow from the seller for payment of water charges for the property. The complaint filed in May 2001 by the seller, Richard Huffman, stated that he had made unsuccessful attempts to contact the Respondent by telephone to discuss the unpaid water charges. After being contacted by the ODC, the Respondent resolved the water charges and made a refund to Huffman from the funds held in escrow. However, in response to the ODC’s request for confirmation that documents related to this real estate transaction had been recorded and title insurance issued, the Respondent provided proof of recording but indicated that he was researching the title insurance question. The ODC corresponded with the Respondent, requesting updated information and documentation relating to the issuance of title insurance, as well as information about the Respondent’s compliance with his financial record keeping obligations. After the Respondent failed to provide timely and adequate responses on these issues, the ODC issued a subpoena duces tecum for an audit to be performed by Joseph F. McCullough, Auditor for the LFCP. In preparation for the audit, the Respondent discovered that he had failed to file any City of Wilmington net profit tax returns, or paid such taxes, over the past five years (i.e., 1996 through 2000 returns). The audit also reflected that the Respondent’s financial recordkeeping was inadequate under the Rules, and provided further information regarding a number of real estate settlements for which there had been delays in the procurement of title insurance policies, even though checks had been written for the premiums and sent to the insurance company, because the Respondent had not maintained

and reviewed on a monthly basis a listing of outstanding checks on his escrow account so as to bring the unreasonable delays to his attention. The Respondent resolved the title insurance issues by November 2001, and promptly addressed and resolved the financial recordkeeping and City tax deficiencies.

The Respondent admitted that he had violated the following Rules:

(1) Rule 1.15(b) (stating, in part, that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive"), by (a) failing to take reasonably prompt steps to disburse the funds held in escrow for the water bill in the Thies/Huffman settlement, particularly after being contacted by Huffman in October 2000 and thereafter. In addition, (b) although checks were issued and forwarded to the Respondent's title insurance company in a timely manner, the Respondent violated Rule 1.15(b) by failing to take reasonably prompt steps to disburse the uncleared funds remaining in his escrow account for title insurance premiums in several real estate transactions;

(2) Rule 1.15(d) and former Interpretive Guideline No. 2 (setting forth requirements for lawyer financial record keeping), by failing properly to maintain and preserve his law practice books and records for his escrow account and his operating account, and to disburse funds held in his escrow account, as follows:

(a) From January 1997 through October 2001, the Respondent failed to maintain and preserve proper monthly bank reconciliation schedules for his escrow and operating accounts;

(b) From January 1997 through October 2001, the Respondent failed to maintain and preserve monthly lists of outstanding checks for his escrow and operating accounts, as part of a proper monthly reconciliation process; and

(c) From April 2000 through October 2001, the Respondent failed to take reasonable steps to disburse settlement funds remaining in his escrow account for title insurance policy premiums for real estate settlements that took place between April 2000 and December 2000; and

(3) Rule 8.4(d) (prohibiting a lawyer from engaging in "conduct prejudicial to the administration of justice"), by negligently failing to file City of Wilmington net profit tax returns or pay such taxes for tax years 1996 through 2000, inclusive; and by filing with the Supreme Court Certificates of Compliance in 1998 through 2001 inclusive, which, in light of the Respondent's negligent failure to file City of Wilmington net profit tax returns or pay such taxes, contained incorrect responses relating to the timely filing and payment of income taxes. In addition, at the time that the Respondent signed and filed his Certificate of Compliance for 2001, there were multiple checks written on his escrow account that had been outstanding for an unreasonable period of time. By negligently representing in response

to item 6(f) on the Certificate that all funds in the escrow account had been disbursed on a timely basis, the Respondent violated Rule 8.4(d).

As aggravating factors, the Board considered (1) the Respondent's prior private disciplinary record, consisting of a private admonition in 1987 for violation of Rule 1.1 (requiring competent representation), and a private admonition in 1991 for violation of Rule 1.3 (requiring reasonably diligent representation); (2) the pattern of Rules violations over an extended period of time; and (3) the Respondent's substantial experience in the practice of law. As mitigating factors, the Board considered that (1) the Respondent had not been previously disciplined for any violations of the Rules regarding lawyer record keeping or tax obligations, or Certificate of Compliance obligations; (2) the absence of a dishonest or selfish motive; (3) the Respondent experienced personal problems during 2000 and 2001 which impacted on his attention to law office management issues; (4) the Respondent's timely good faith efforts to rectify the consequences of his misconduct; (5) the Respondent was cooperating with the ODC, and made full and free disclosure to the Board regarding his conduct; (6) the Respondent demonstrated remorse and recognized the wrongfulness of his conduct; and (7) the Respondent's character and reputation in the Bar, including his record of public service.

The Court approved the terms of probation recommended by the Board, which included (1) reporting to the ODC by a licensed certified public accountant (monthly for the first year and quarterly for the second year) as to the Respondent's compliance with law office record keeping requirements and tax obligations; and (2) the Respondent's cooperation with the ODC and the LFCP, including audits on at least an annual basis at the Respondent's expense. Finally, as conditions of the disciplinary sanction, the Respondent was required to pay the ODC's costs, pursuant to Procedural Rule 27, as well as the costs of the audits performed by the LFCP.